

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
THE TJX COMPANIES, INC. : DECISION
 : DTA No. 812048
for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period June 1, 1987 through November 30, 1988. :

Petitioner The TJX Companies, Inc., Tax Department, Route 1E, 770 Cochituate Road, Framingham, Massachusetts 01701, filed an exception to the determination of the Administrative Law Judge issued on November 9, 1995. Petitioner appeared by S. Michael Finn, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John O. Michaelson, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter stating it would not file a brief in opposition. Petitioner's request for oral argument was denied.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioner Jenkins concurs. Commissioner Pinto took no part in the consideration of this decision.

ISSUES

I. Whether the Division of Taxation improperly estimated the tax assessed against petitioner.

II. Whether petitioner is entitled to credit for alleged overpayments of sales taxes on employee discount sales.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Following a field audit of the books and records of petitioner, The TJX Companies, Inc. f/k/a Zayre Corp. ("TJX"), the Division of Taxation ("Division") issued to TJX a Notice of Determination for additional sales and use taxes due, dated June 15, 1992, for the period June 1, 1987 through November 30, 1988 in the sum of \$620,255.88, plus penalty and interest.

A conference was held in the Bureau of Conciliation and Mediation Services on January 20, 1993 and an order was issued on April 9, 1993, sustaining the notice in its entirety.

TJX was a publicly-held Delaware corporation with its principal place of business in Framingham, Massachusetts. Until October of 1988, TJX and 28 wholly-owned subsidiaries operated the Zayre chain of retail stores including in excess of 350 stores in more than 20 states. This was referred to as the "Zayre Division."

Although it will be discussed in greater detail below, a brief summary of the alleged bulk transfer is necessary for an understanding of the audit. In October of 1988, TJX made what it characterized as a capital contribution of the net assets of various Zayre store locations in various locations in numerous states to four of its wholly-owned subsidiaries. The capital contribution to one of these subsidiaries, Zayre Central Corp., included the furniture, fixtures and equipment of Zayre store locations in the State of New York.

The capital contribution was part of a strategy utilized by petitioner in connection with the purchase of the Zayre Division from TJX by Ames Department Stores, Inc. ("Ames") pursuant to an Acquisition Agreement dated September 15, 1988 (the "Agreement"). Originally, said Agreement called for certain assets and liabilities of the Zayre Division to be transferred to Fixtron, Inc. ("Newco"), a wholly-owned subsidiary of TJX.

After several amendments to the Agreement prior to the sale of the Division to Ames, it was agreed, in "Amendment 2" that certain assets and liabilities of the Zayre Division would be transferred to Zayre Central Corp., Zayre Florida Corp., Zayre New England Corp., or Zayre Illinois Corp. rather than to Newco. The same "Amendment 2" further provided that no specified

subsidiary would be liable for any liabilities pertaining to specific assets transferred to it unless it executed and delivered to TJX an instrument of assumption to effectuate such liability.

Zayre Central Corp. did not issue any stock to TJX in exchange for the capital contribution nor did it deliver an instrument of assumption to TJX with respect to liabilities pertaining to the New York furniture, fixtures and equipment included in the contribution.

The Division performed a field audit of TJX between July 1990 and September 1992, spending 227 hours doing so. There had been a prior audit for the period 1982 through May 31, 1987. Both the sales and purchase records of TJX were requested and reviewed and found to be adequate. The records were reviewed in detail. The detailed review yielded additional taxable sales of \$726,089.00 and additional sales tax due of \$49,464.78, which was comprised of \$4,099.22 on cigarette sales, \$10,236.79 on store sales and \$35,128.77 on employee sales. In addition, the Division assessed use tax on fixtures and equipment in the sum \$45,079.64. Additional use tax of \$41,760.42 was assessed on recurring expenses (\$23,302.77) and on advertisement circulars (\$18,457.65). Finally, the Division assessed bulk sales tax on the transfer between Zayre and Ames in the sum of \$483,951.04. The Division, in its audit report, described the transaction as follows:

"Zayre Corp. transferred all of the Zayre stores business assets to four wholly-owned subsidiaries of the taxpayer; namely Zayre Central Corp., Zayre Florida Corp., Zayre New England Corp., and Zayre Illinois Corp.

"On October 28, 1988 Zayre Corp sold the stock of the four wholly-owned subs[idiaries] including Netco Inc., to Ames Department Stores Inc. Bulk Sales tax due on the transfer of TPP totaled \$483,951.04."

At the request of the Division, the tax manager of TJX provided revised figures for the value of the tangible personal property transferred to Zayre Central Corp. Specifically, she provided revised values for the furniture and fixtures of Gaylords National Corp. of \$627,101.04, resulting in a revised sales tax of \$43,897.07; a revised value for the furniture and fixtures of NETCO Inc. of \$492,877.92, resulting in a revised sales tax of \$40,662.43; and a revised value

of the furniture and fixtures of Zayre Corp. of \$4,376,413.91, which would have resulted in a revised sales tax of \$308,978.88. However, the Division utilized the revised values only for Gaylords National Corp. and NETCO Inc. but not the value submitted for Zayre Corp. The Division utilized a value provided by petitioner at an earlier point in the audit. The values were provided to the Division by letter dated December 20, 1991, approximately six months prior to the issuance of the Notice of Determination. The Division offered no reason for not utilizing the revised value for the furniture and fixtures of Zayre Corp. transferred to Zayre Central Corp.

TJX executed three consents to extend the period of limitation for assessment of sales and use taxes, the final one executed on August 12, 1991, which permitted the Division to issue an assessment for the audit period on or before June 20, 1992.

TJX was audited for the period 1982 through May 31, 1987, and the issue of discount sales to employees arose in that audit as well. The auditor informed petitioner on the current audit that he had told it of the error on the prior audit and asked that it be corrected because the method resulted in the erroneous collection of tax. TJX claimed a tax credit in the sum of \$35,000.00 in January of 1988, due to the incorrect way it had been collecting the tax (discussed in detail below). However, in the prior audit, the methodology was ultimately accepted. Petitioner did not change its employee discount sales policy, set forth in its Manual of Operations, and did not have any register tapes to verify that the methodology described in the policy was in fact followed, even though the tapes were requested. Petitioner currently claims a credit of \$90,448.22.

Petitioner's Manual of Operations, Volume 2, Section K, pages 1 and 2, dated February 1986, described the procedure for registering an associate (employee) discount. The policy clearly states that the discount is calculated on the entire amount of the sale including tax. Cash and check sales were given a 10% discount and credit sales were given a 5% discount.

Petitioner's manager of tax audits and risk management testified that, in the absence of register tapes, she calculated the overpaid tax on the employee or associate sales. The manager determined total discounts from the general ledger accounts which broke out the discounts on a monthly basis for each store. The focus was on the discounts to determine the overpayments because the discounts account was overstated in the same amount as the tax accrual account. The taxable percentage was determined for each store for each month (almost 100% in every case) and applied to the discount sales to arrive at discounts on taxable purchases. This was divided by one plus the tax rate and yielded the adjustment made to both the discounts account and the sales tax accrual account. The overpayment calculated in this manner for the entire audit period was \$90,448.22.

Petitioner claimed a credit of only \$35,128.78 in January of 1988 and did not pursue the issue of overpayment because of the time and manpower involved in doing the calculation for each state and every store.

Petitioner admitted that its record keeping procedure in processing discount sales was to apply the discount to the sales price and applicable sales tax. It used the following example to illustrate:

(a) A discount sale was rung through the register as follows:

Price	\$10.00
Sales Tax	\$.70
Subtotal	\$10.70
10 % Discount	1.07
Amount Collected	\$ 9.63 *

* Discounted sales price of \$9.00 plus .63 sales tax

(b) The amount recorded on the general ledger would be:

Sales account	\$10.00
Sales Tax Accrual	.70
Discount Account	\$ 1.07

The sales tax reported and remitted by TJX to the State of New York was the amount recorded in the Sales Tax Accrual Account (\$.70).

(c) The amounts recorded should have been:

Sales account	\$10.00
Sales tax accrual	.63
Discount account	\$ 1.00

Although Zayre management was aware of the problem with the employee discount sales in 1987, it took no action to rectify the situation due to poor financial condition. Zayre suffered its first loss at that time and chose not to expend the financial or human resources to correct the problem. Rather, it made the conscious decision to resolve the problem on audit.

Further complicating the matter was the fact that Zayre Division was sold to Ames and the records requested by the auditor were in Ames's possession. The tax manager said that some records were requested and not produced by Ames and others were simply not requested because petitioner assumed Ames either would not have the documentation or would not produce it.

The Acquisition Agreement between Ames Department Stores, Inc. and Zayre Corp., dated September 15, 1988, by its terms, described the parties' desire to transfer all the assets and business of the Zayre Division to Ames in a transaction in which the parties would make elections in accordance with section 338(g) and (h)(10) of the Internal Revenue Code ("IRC") of 1986, as amended, a section entitled "Certain Stock Purchases Treated as Asset Acquisitions". The Agreement acknowledges that the Zayre Division was operated through Zayre's subsidiaries and recited that the assets and liabilities of the Zayre Division would be transferred, immediately prior to closing, to Fixtron, Inc. ("Fixtron"), and Newco. Then, at closing, Zayre would transfer all the shares of stock in said subsidiaries to Ames.

This was modified somewhat by the Second Amendment to the Agreement, dated October 28, 1988, in section "5", wherein it stated that:

"Paper Chase, etc. Pursuant to the Acquisition Agreement, the Seller and the Buyer have agreed that, in lieu of transferring certain Assets and Liabilities to Fixtron, Inc., such Assets and Liabilities are to be transferred (or heretofore have been transferred) to one of Zayre Central Corp., Zayre Florida Corp., Zayre New England Corp. or Zayre Illinois Corp., each a Delaware corporation (such corporations being hereinafter referred to as the

'Specified Subsidiaries'). Except as the context otherwise requires to avoid manifest error, the term 'Newco' as used in the Acquisition Agreement shall be deemed to refer to each of the Specified Subsidiaries; provided, however, that no Specified Subsidiary shall be liable for any Liability other than (i) Liabilities in respect of Leases assumed in writing by such Specified Subsidiary or (ii) other Liabilities pertaining to other specific Assets transferred to such Specified Subsidiary (and the Buyer hereby agrees that in connection with the Closing each Specified Subsidiary shall execute and deliver to the Seller an instrument of assumption in order to effectuate this clause (ii))."

With respect to the liabilities for which the specified subsidiaries might be liable pursuant to the terms of the above section, it is noted that Zayre Central Corp., which received the stores in New York, did not deliver any instrument of assumption with respect to the furniture, fixtures and equipment in the New York locations included in the "capital contribution".

With respect to the transfer of the assets of the New York stores to Zayre Central Corp. in the "capital contribution", Zayre Corp. and Zayre Central Corp. executed 18 gains tax transferor and transferee questionnaires, all dated October 20, 1988, covering property described as "The Atrium" in Syracuse, New York and 17 other store locations throughout New York State, and each transferor questionnaire recited an exemption from real property gains tax pursuant to Tax Law § 1443(5), for the transfer of a lease assignment from a parent corporation to a 100% owned subsidiary corporation.

In addition, Zayre Corp. and Ames Department Stores, Inc. filed real property gains tax transferor and transferee questionnaires, dated October 20, 1988, which recited the transfer of all the stock of Zayre Central Corp. to Ames in consideration of \$5,396,749.00 for a controlling interest in Zayre Central Corp. The gain subject to tax was \$849,536.00 and tax thereon was anticipated to be \$84,954.00.

Zayre Central Corp. was one of 28 Zayre subsidiaries sold to Ames as part of the Acquisition Agreement. It was incorporated on or about September 30, 1966. Other than Zayre Central, Gaylords National Corporation and NETCO, Inc. had business operations in New York State. Gaylords operated several retail stores d/b/a Zayre stores and NETCO was a buying office

and warehouse in New York City for the Zayre Division. Zayre Corp. did not make any "capital contribution" to Gaylords or NETCO at or near the time of the sale of the Zayre Division to Ames. Both companies had been doing business in New York for many years, maintained their own assets and were registered vendors in New York, filing sales and use tax returns and remitting tax therewith separate from Zayre Corp.

The United States Corporation Income Tax Return for the period ended January 28, 1989 filed on behalf of The TJX Companies, Inc. (formerly Zayre Corp.) & Subsidiaries, was filed on or about July 18, 1989. As a reflection of the fact that a sale of stock in a subsidiary had occurred in the period covered by the return, TJX filed a supporting schedule, Form 8023, Corporation Qualified Stock Purchase Elections. This election is a special Federal tax election which allows a buyer and a seller to elect, when they are selling stock of a corporation, to treat the sale of a corporation (stock of the corporation) as an asset sale for income tax purposes. The form is an express joint election pursuant to IRC § 338(h)(10) and an express election by a purchasing corporation under section 338(g).

Attached to the Form 8023 was a list of all the subsidiaries that were sold by Zayre Corp to Ames Department Stores, including Zayre Central Corp., Gaylords National Corp. and NETCO.

In addition, the Federal income tax return for the period ended January 28, 1989 included Form 851, Affiliations Schedule. Essentially, Form 851 is a schedule which indicates the ownership of the parent and its subsidiaries and any transactions that took place during the year that affected the subsidiaries.

In the Form 851 which accompanied the Federal income tax return for the period ended January 28, 1989, it is noted that Zayre Central Corp., Gaylords National Corp. and NETCO, Inc. were disposed of in their entirety to Ames Department Stores, Inc. on October 28, 1988. It was also noted that Zayre Tenth Realty Corp. changed its name to Zayre Central Corp. on October 28, 1988.

The Federal income tax return for the period ending January 28, 1989 was audited by the Internal Revenue Service, which accepted the structure of the stock sale to Ames Department Stores, Inc. as evidenced by reference to the transaction in a Report Transmittal from the Internal Revenue Service regarding the audit for fiscal years ending January 1991 and January 1992, dated January 13, 1995. On pages six and seven of that report, the Internal Revenue Service agent described the history and nature of the business, including the transaction in issue with respect to bulk sales tax. The report described the following:

"HISTORY AND NATURE OF THE BUSINESS:

"Prior to October 1988, TJX was Zayre Corp. and Subsidiaries. As Zayre Corp., along with its wholly owned subsidiaries, it operated a diversified group of chain stores. It consisted of six operating divisions, Zayre Stores, T.J. Maxx, Hit or Miss, Chadwick's of Boston, BJ's Wholesale Club and Homeclub.

"In a transaction which closed in October of 1988, the taxpayer sold its entire Zayre stores operation to an unrelated third party; Ames Department Stores, Inc. The transaction involved two steps. The two steps are set forth below:

"First, the taxpayer transferred all of the Zayre store business assets held directly by the taxpayer (that is, those Zayre stores assets not already held by one of the taxpayer's Zayre division subsidiaries) as a contribution to the capital of four wholly owned subsidiaries of the taxpayer; Zayre Central Corporation; Zayre Florida Corporation; Zayre New England Corporation and Zayre Illinois Corporation; (These Corporations were formerly known as Zayre Tenth Realty Corporation., Zayre Fifteenth Realty Corporation., Zayre Ninth Realty Corp., and Retail Property, Inc., respectively.) This transfer was subject to the provisions of Section 351 of the Internal Revenue Code. Under Section 351, no gain or loss is recognized on such transfers provided that the parent retains control of the subsidiary subsequent to the transfer. However, since the stock of the subsidiaries was sold immediately after the assets were transferred (see below), the general rule that no gain or loss was to be recognized did not apply. Consequently, the taxpayer recognized gain or loss to the extent of the difference between its basis in the transferred assets and the fair market value of those assets on the date of transfer.

"Second, the taxpayer sold to Ames the stock of Zayre Central Corp., Zayre Florida Corp., Zayre New England Corp., Zayre Illinois Corp., and twenty-four other wholly owned

subsidiaries which were part of the Zayre store operations. The parties subsequently made a timely election under Section 338(h)(10) of the Internal Revenue Code with respect to this stock sale. Accordingly, each subsidiary recognized gain or loss as if, while still a member of the taxpayer's consolidated group, it had sold all of its assets as of the close of business on October 28, 1988. Moreover, in accordance with Temp. Regs. Sec. 1.338(h)(10)-IT(e)(2), no gain or loss was recognized by the taxpayer on the sale of the stock."

Petitioner's representative submitted six "Errata Sheets" which requested numerous changes in the transcript. On the whole, the changes were minor and were not disputed by the Division. Therefore, said changes have been accepted for the purposes of this determination.

As part of the volumes containing the various documentation with respect to the acquisition of Zayre Discount Stores Division from Zayre Corp., there were prepared and included bills of sale between Zayre Corp. and Zayre Central, Zayre Florida, Zayre Illinois, Zayre New England and Ames, all dated October 28, 1988. The purpose of the bills of sale between Zayre Corp. and Zayre Central was said to be to demonstrate to Ames that Zayre Central Corp. did in fact have title to the assets transferred to it by Zayre Corp. in the capital contribution transaction.

OPINION

In his determination, the Administrative Law Judge concluded that the transfer of the assets of the Zayre retail store division to Ames by means of a capital contribution to four of petitioner's subsidiaries was not a bulk transfer subject to sales tax due to the exclusion for capital contributions provided for in 20 NYCRR 526.6(d)(8)(ii). Further, the Administrative Law Judge concluded that the Division's denial of petitioner's claim for refund or credit for overpayment of sales tax in the sum of \$90,448.22 on employee discount sales was proper because petitioner did not meet its burden of proof to show entitlement to such credit. Finally, the Administrative Law Judge determined that given the circumstances which existed within the TJX Companies during the period in issue, the steps it took to improve its tax compliance and the

scale of the operations of its business, reasonable cause existed to abate the penalty imposed by the Division.

Following the issuance of the Administrative Law Judge's determination, both the Division and petitioner filed exceptions. The Division withdrew its exception, leaving for our consideration only the issues raised by petitioner in its exception.

First, petitioner argues in its exception that the Notice of Determination should be dismissed in its entirety because the Division failed to complete its audit in a timely manner and improperly estimated petitioner's tax liability to avoid the expiration of the statute of limitations. We find this argument to be without merit. As petitioner correctly notes, the Administrative Law Judge did not address this issue in his determination. Contrary to the assertions of petitioner, however, this issue was not presented to the Administrative Law Judge for consideration. In petitioner's reply memorandum of law to the Administrative Law Judge, the appropriateness of the estimation of sales tax due solely on the alleged bulk transfer of assets was raised. In his determination, the Administrative Law Judge concluded that, in the event that the alleged bulk transfer was found to be a taxable retail sale on appeal, then the asset values provided by petitioner should have been used by the Division in computing the value of the assets subject to the bulk transfer. However, it was not until the filing of its exception that petitioner raised the propriety of the Division's calculation of the assessment in its entirety.

There is adequate support in the record for the finding of the Administrative Law Judge that the records of petitioner were reviewed in detail and that:

"[t]he detailed review yielded additional taxable sales of \$726,089.00 and additional sales tax due of \$49,464.78, which was comprised of \$4,099.22 on cigarette sales, \$10,236.79 on store sales and \$35,128.77 on employee sales. In addition, the Division assessed use tax on fixtures and equipment in the sum \$45,079.64. Additional use tax of \$41,760.42 was assessed on recurring expenses (\$23,302.77) and on advertisement circulars (\$18,457.65)" (Determination, finding of fact "5").

Further, this challenge to the assessment in its entirety is belied by allegations contained in the petition. Although petitioner alleged that it was entitled to credits in the amount of alleged overpayments of sales tax resulting from employee discount sales and contested that its capital contribution to Zayre Central Corp. was a bulk transfer of assets, petitioner specifically acknowledged its liability for \$45,856.62 of the tax asserted due in the Notice of Determination.

Second, in his determination, the Administrative Law Judge found that petitioner was not entitled to the claimed refund because it was unable to provide any register tapes or other source documentation to prove that even one sale was made to its employees pursuant to the policy set forth in its Manual of Operations or to demonstrate how much its employees actually paid in sales tax. The fact that Ames gained control of petitioner's records after the acquisition of the Zayre Division did not excuse the failure of petitioner to meet its obligation to have records available for inspection and examination upon demand by the Division. Given the fact that employee sales were contested in an audit for years prior to the ones in issue, petitioner was certainly on notice that records of these sales were critical.

Petitioner argues that case law does not mandate "practically perfect record keeping in order to receive a refund of an undisputed overpayment" (Raemart Drugs v. Wetzler, 157 AD2d 22, 555 NYS2d 458) nor, argues petitioner, does credible testimony require corroborating documentary evidence in order for a taxpayer to prevail (Matter of Avildsen, Tax Appeals Tribunal, May 19, 1994). Here, however, the Administrative Law Judge found that when petitioner unsuccessfully attempted to obtain its records from Ames, it concluded that the risk of not having the records was outweighed by the cost of trying to find them.

The Administrative Law Judge also considered petitioner's argument that it did not have enough time to change its methodology or that it relied on the decision in the prior audit to permit the collection of tax in the manner described in the Manual of Operations. This argument was rejected by the Administrative Law Judge who concluded that:

"Petitioner knew that the Division expected it to correct its method of collecting tax on employee discount sales and that it would be expected to demonstrate compliance through documentation. The fact that it paid no attention to these instructions vitiates any claim for equitable relief" (Determination, conclusion of law "B").

After reviewing all the evidence presented in this case, we are not persuaded that we should change the findings of fact or conclusions of law of the Administrative Law Judge in any respect. Therefore, we affirm the Administrative Law Judge's determination for the reasons set forth in his determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of The TJX Companies, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of The TJX Companies, Inc. is denied; and
4. The Notice of Determination, dated June 15, 1992, is sustained.

DATED: Troy, New York
February 13, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner